mailed 2/4/99

In the Matter of:	*	
	*	
Thurman Putman	*	Case No.: 1998-LHC-242
Claimant	*	
	*	
v.	*	
	*	OWCP No.: 1-139869
Electric Boat Corporation	*	
Employer/Self-Insurer	*	

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DINARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. § 901, **et seq.**), herein referred to as the "Act." The hearing was held on September 24, 1998, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 16	Attorney Quay's letter requesting	10/19/98

	leave to file a post-hearing brief	
ALJ EX 7	This Court's ORDER granting the Employer's request to file a post-hearing brief	10/21/98
ALJ EX 8	Notice of the taking of the deposition of Dr. Walter Borden	10/21/98
RX 17	Attorney Quay's letter filing the	11/4/98
RX 18	Employer's Motion to exclude the deposition testimony of Dr. Mark Schroeder	11/4/98
RX 19	Attorney Quay's letter filing the	11/4/98
RX 20	Office notes of Dr. Mark Schroeder	11/4/98
RX 21	Attorney Quay's letter filing the	11/12/98
RX 22	Deposition testimony of Dr. Walter Borden	11/12/98
RX 23	Attorney Quay's letter filing the	11/12/98
RX 24	Employer's brief	11/12/98
CX 6	Claimant's response to the Employer's motion to exclude the deposition testimony of Dr. Mark Schroeder	11/18/98
CX 7	Claimant's brief	11/18/98
CX 8	Attorney Embry's fee petition	11/18/98
RX 25	Employer's objection to the fee petition	11/23/98

The record was closed on November 23, 1998 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the time of injury.

3. Claimant alleges that he suffered an injury on February 11, 1997, in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury on February 27, 1997 in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on May 7, 1997.

7. The applicable average weekly wage is $800.53.

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether the Claimant's psychological condition constitutes a work-related maritime injury.

2. If so, the nature and extent of his psychological impairment.

3. Claimant's entitlement to medical benefits and interest on past due compensation.

PROCEDURAL MATTERS

The admission into evidence of RX 4 and RX 13 was objected to at the hearing by Claimant's counsel. A ruling was postponed at that time but I now admit into evidence both RX 4 and RX 13 as relevant, material and not unduly cumulative herein as the objections go more to the weight to be accorded the evidence. Employer also objected post-hearing to a portion of Dr. Mark Schroeder's deposition testimony dealing with a hypothetical question. (RX 18) Employer's objection is denied as the Employer failed to object to the introduction of the deposition testimony at the hearing. (TR at 9) In fact, the motion was filed approximately six weeks after the hearing. Moreover, Employer's objection is also denied because there were facts entered into evidence which support the underlying assumptions of the hypothetical. Therefore, as above, the objection really goes to the weight to be accorded the doctor's response and not to the admissibility of the statement as a whole.

SUMMARY OF EVIDENCE

Thurman Putman ("Claimant" herein), who was born on May 28, 1948 (RX 3) and who has an employment history of manual labor, first as a construction worker and then as a welder, began working on September 22, 1975 at the Groton shipyard of the Electric Boat Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames river where the Employer builds, repairs and overhauls submarines. Claimant was employed as a welder and throughout his employment at the Employer's shipyard he performed work related to submarine repair or new submarine construction aboard submarines on the navigable waters of the Thames river or its adjacent piers and dry docks. (RX 3)

Claimant completed the tenth grade and obtained his GED. (TR 38) Claimant then worked on road construction for twelve years before going to work as a welder at Electric Boat. (TR 38) Claimant began working for Electric Boat in approximately 1974 in Groton, Connecticut. (TR 39) He began as a third class mechanic and eventually moved up to first class mechanic. (TR 53)

The incidents which gave rise to this claim for disability benefits began in or around January of 1997. At that time, Claimant was welding in the engine room of one of the boats when a spark fell down to a lower deck and ignited a fire. (TR 40) Claimant stated that because he had to use a fire extinguisher, he was required to attend a critique in which he was represented by a union steward. (TR 41)

Claimant testified that on his next assignment there were a number of oily rags about, which presented a fire hazard, and a union steward was assigned to him as a fire watch. (TR 41) Claimant saw this as a setup. (TR 41) Claimant felt that if he started another fire he would have "probably been walked out the gate." (TR 42) Claimant also contends that, with relation to the first fire, he was the only person given a warning slip even though they were six or eight fires that week. (TR 42) As a result of those actions, Claimant "felt the boss was trying – he was afraid he was going to get laid (off) and he wanted to make himself look good so he took it upon himself to give me a warning slip." (TR 43)

At the same time that Claimant received a warning slip for starting the fire, he had also been transferred to third shift from the first shift. (TR 47) This in turn caused difficulty in sleeping. (TR 48) This combination of factors led to difficulty in the Claimant coping with his problems and caused him to become reclusive and not to want to leave his house. (TR 48) Claimant also talked to his wife about not wanting to live anymore. (TR 49)

Claimant then began taking his wife's Phenobarbital stating "I couldn't sleep and the stress got to me and then I took one to – so I could go to sleep and it felt pretty so I took some more. I didn't want to live anymore. I just wanted to sleep." (TR 50) Mr. Putman's wife discovered this fact and the Claimant ended up going to Backus Hospital. (TR 50)

Claimant stated that company guidelines became more strict over the years as the company attempted to cut down on fires. (TR 54) Claimant also stated that when the fire started in January of 1997, a supervisor was present but he fled the area when the fire began because he did not want to be responsible. Claimant could not recall the name of the supervisor. (TR 57) Claimant testified that he left work knowing that he would soon be laid off. (TR 57) Claimant did state that he had another job lined up with Bob Robinson Paving that was not definite but of which he felt confident since the owner was a longtime acquaintance. (TR 58)

Claimant stated that the jobs he received after the fire on January 22, 1997 were not bad jobs per se, but, they did present greater fire hazards. (TR 75; RX 8) Claimant contends that the jobs he was asked to do after the fire were in areas where a number of oily rags were present. (TR 75) Claimant requested a transfer to a different shift or a transfer away from his boss immediately after the fire started. (TR 77)

Claimant stated that he first began seeing Dr. Schroeder, a psychiatrist, in 1993 following his wife's car accident. (TR 45) Claimant stated that when he was taking his wife back and forth to Dr. Schroeder he also came under his care to deal with problems relating to his mother's death from cancer and his son's own battle with cancer at that time. (TR 46) Claimant does not recall visits to Dr. Schroeder in February of 1995 or August of 1996. (TR 63-65) He also does not recall expressing concern to Dr. Schroeder about possible layoffs at any of those or other appointments. (ID) Claimant is currently seeing Dr. Schroeder once a month after recently reducing the frequency of his visits from every two weeks. (TR 67) Claimant is currently taking Paxil and Canobin. (TR 67) Claimant admitted that when he saw Dr. Schroeder in 1993 he discussed family problems, namely, discord between his wife and her mother and problems with his son and drugs. (TR 68)

Claimant has not been able to work since he left Electric Boat in February of 1997 because "I don't think I could. I'd probably blow up." (TR 51) Claimant is currently volunteering at a food bank once a week. (TR 51) Claimant does not feel that he could return to work as a welder because there is "(t)oo much stress." (TR 52)

Claimant's spouse, Jacqueline Sullivan-Putman, also testified

at the hearing. Mrs. Putman testified that she noticed a significant change in her husband's behavior following the incidents as mentioned above. She stated that friends were not allowed in the house anymore because the Claimant would just retreat to his bedroom. (TR 85) The Claimant also has difficulty going out to do simple tasks such as grocery shopping. (TR 86) Mrs. Putman also stated that her husband was supposed to do volunteer work for the Church of Jesus Christ of Latter Day Saints because they are assisting the Putmans with paying their bills. However, the Claimant does not do any work and just ends up sitting in the car while Mrs. Putman does the work. (TR 86-88)

Charles Ballato, a labor relations representative in the management and human resources division, also testified at the hearing. Mr. Ballato testified that he was the person, identified as "Charlie" by Mr. Putman, with whom the Claimant had a conversation regarding his problems at work. Mr. Ballato testified that Mrs. Putman called him and told him about various problems that the Claimant was having at work. (TR 92) Mr. Ballato did not recall if the Claimant was still working at that time. (TR 92) Mr. Ballato also spoke with the Claimant during that phone conversation who told him about problems with his shift and problems with his supervisor. Mr. Ballato told the Claimant that he could not discuss his problems vis a vis his shift because it is policy to only discuss those types of issues with a union representative present. (TR 93) Mr. Ballato did tell the Claimant that he would talk to his supervisor. (TR 93) Mr. Ballato did not recall making any statements to Mr. Putman that the supervisor in question had been a problem in the past. (TR 93)

Palen J. Yorgensen, the superintendent of steel trades, also testified at the hearing. (TR 97) Mr. Yorgensen testified that there is a policy known as SB1-4 which mandates a critique following any unusual occurrences at the shipyard to ascertain the facts. (TR 98) Mr. Yorgensen also testified that in the time frame of 1995-1997 a greater emphasis was put on fire prevention and control resulting from complaints from the Navy. (TR 98-99) Mr. Jorgensen also stated that hourly employees were made aware of the new procedures through a memo outlining the policies which was signed by Mr. Putman. (TR 99-100; RX 11)Mr. Jorgensen stated that a critique was conducted in the case of the January 1997 fire, which led to this claim, because there was a fire, not because a fire extinguisher had been used. (TR 102) Mr. Jorgensen also stated that numerous warning slips were issued to individuals other than Mr. Putman following a critique. (TR 102) Mr. Jorgensen is the superior of Jeff Belastracci who was Mr. Putman's supervisor at the time of the incident. Mr. Jorgensen testified that this was the first time anything was brought to his attention about problems with him as a supervisor. (TR 103-104) Mr. Jorgensen admitted that

the supervisor had a concomitant responsibility with a welder to ensure that proper cover-up procedures were followed before welding. (TR 107) Mr. Jorgensen finally stated that he does not know who the individual was who fled the scene, as stated by Mr. Putman, when the fire started, but, that that person also breached regulations. (TR 107)

Jeffrey A. Belastracci, the Claimant's immediate supervisor, testified as well at the hearing. Mr. Belastracci conducted the critique following the fire in January of 1997. (TR 110, EX 8) Mr. Belastracci in doing the investigation for that critique was not told of anyone leaving the area. (TR 111) Mr. Belastracci concluded that the cause of the fire was the welder's failure to provide adequate containment prior to starting his work. (TR 112; EX 8) Mr. Belastracci was not the supervisor in the area as stated by Mr. Putman. (TR 112) Mr. Belastracci also stated that with reference to the assignments given to Mr. Putman after the fire would not have differed in any way from assignments he was given prior to the fire. (TR 113) Mr. Belastracci testified that a fire watch was often assigned to welders and that more fire watches were assigned as a ship neared completion. (TR 114) On cross-examination, Mr. Belastracci admitted that he checked Mr. Putman's containment prior to Claimant beginning to weld. (TR 117)

Dr. Mark Schroeder, a psychiatrist, has been treating the Claimant off and on since December of 1993 when he first saw him for depression and anxiety related to family issues. He next saw the Claimant on February 8, 1995 again for anxiety and depression and "fleeting suicidal thoughts, relating to family, financial, and work stresses." (CX 1) Dr. Schroeder prescribed Klonopin, an anti-anxiety medication, in response. Dr. Schroeder next saw Claimant on August 21, 1996 for anxiety over a potential layoff at work. The Doctor again prescribed Klonopin. Dr. Schroeder saw the Claimant on February 11, 1997 for treatment as a result of the incident which led to this claim. Dr. Schroeder reports that the Claimant was "deeply depressed and had serious suicidal thoughts." Mr. Putman reported that the depression resulted from anxiety over an impending layoff and perceived unfair treatment at work. Dr. Schroeder hospitalized the patient until February 14, 1997. Dr. Schroeder concluded that the patient is improved, but, that he has been totally disabled since February 11, 1997. Dr. Schroeder opined that the Claimant may be able to return to work at some point in the future but cannot give a definite time.

Dr. Schroeder was also deposed on April 22, 1998. (CX 5) He testified that he had been treating the Claimant approximately monthly since February of 1997. (CX 5 at 9) Dr. Schroeder reported that the Claimant has improved since February of 1997, but, that he is still easily overwhelmed, cries easily, is socially withdrawn,

irritable and unable to work. Dr. Schroeder also stated that the various incidents at work were emotional stresses on him. Dr. Schroeder opined that the Claimant is totally disabled at this time and is unable to engage in any employment. (CX 5 at 12) Dr. Schroeder did concede on cross-examination that it is possible that Mr. Putman projected his family problems onto his job and that his job was not the root cause of his problems. (CX 5 at 23) The doctor also conceded that it is possible that Mr. Putman could misperceive an ordinary disciplinary procedure as unfair treatment. (CX 5 at 25)

Dr. Walter A. Borden, also a psychiatrist, examined Claimant on April 17, 1998 at the Employer's request and submitted a report dated May 19, 1998. (RX 14) Dr. Borden concluded that the Claimant is suffering from depression with an underlying personality disorder including dependent, depressive and schizoid features. Dr. Borden opined that the problems arise from complex origins beginning in childhood but that the main problem results from a series of personal losses and anticipated losses. Dr. Borden feels that the Claimant's psychiatric problems are causing his problems at work rather than the problems at work causing his psychiatric problems. Dr. Borden feels that the Claimant's psychiatric problems have impaired his functioning and interfered with his capacity to work causing his difficulties and conflicts with his supervisor.

Dr. Borden was deposed on October 28, 1998 and the transcript of that deposition has been admitted into evidence. (RX 21) Dr. Borden reiterated the conclusions reached in his report and also offered further explanation on some points. He explained again that Claimant's problems at work were an effect rather than a cause of his problems. In support of that conclusion, Dr. Borden pointed out that once Claimant left work, his problems did not cease. Therefore, Dr. Borden concludes, work was not truly the source of his problem. (RX 21 at 15) Dr. Borden opined that Claimant first started to experience depression in approximately 1991 when he approached the age at which his father had died and his mother and son were diagnosed with cancer.

On the basis of the totality of this closed record, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929

(1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v.**

Bethlehem Steel Corp., 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

It is now well settled law in the Second Circuit, under whose jurisdiction this case arises, that a psychiatric condition can constitute an “injury” for the purposes of the Act. The Second Circuit stated in **Pietrunti v. Director, Office of Workers’ Compensation Programs**, quoting a Seventh Circuit decision, “(s)evere depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it.” **Pietrunti v. Director, Office of Workers’ Compensation Programs**, 119 F. 3d 1035, 1043 (2nd Cir. 1997)

In the case **sub judice**, Claimant alleges that the harm to his mental condition, **i.e.**, his clinical depression, resulted from working conditions at the Employer’s facility. Claimant argued that the stress or clinical depression was caused by various working conditions, **i.e.** possible layoff, transfer from the first shift to the third shift, friction with a new supervisor, the critique resulting from the January 1997 fire and the subsequent job assignments in high risk areas. Employer contends that the Claimant’s condition does not constitute an “injury” as defined by the Act as all the actions which led to the Claimant’s current state were legitimate personnel actions and the Claimant’s

condition was in fact caused by the numerous personal difficulties and tragedies which the Claimant suffered over the years.

Initially, it is well established that a psychological impairment which is work related is compensable under the Act. **Sanders v. Alabama Dry Dock & Shipbuilding Co.**, 22 BRBS 340 (1989); **Turner v. Chesapeake and Potomac Telephone Co.**, 16 BRBS 255 (1984). Furthermore, the Section 20(a) presumption is applicable in psychological injury cases. **Cotton v. Newport News Shipbuilding & Dry Dock Co.**, 23 BRBS 380, 384 n.2 (1990). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work related accident occurred or that working conditions existed which could have caused or aggravated the harm. **See Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990); **Perry V. Carolina Shipping Co.**, 25 BRBS 79, 948 F. 2d 941 (5th Cir. 1991, *aff'd sub nom.* **Ins. Co. Of North America v. U.S. Dept. Of Labor, OWCP**, 26 BRBS 14, 969 F. 2d 1400 (2nd Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). An employer generally takes his employee as he finds him. **Gooden v. Director, Office of Workers' Compensation Programs**, 32 BRBS 59 (CRT) (5th Cir. 1998). Claimant is not required to show that his working conditions were unusually stressful. **Whitmore v. AFIA Worldwide Ins.**, 20 BRBS 84 (CRT) 1988 (**Citing Wheatley V. Adler**, 407 F. 2d 307 (D.C. Cir. 1968); **Cairns v. Matson Terminals, Inc.**, 21 BRBS 252 (1988)(citations omitted).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure

sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

In this case, Employer has failed to produce substantial evidence to dispel the Section 20(a) presumption. Employer did offer the report and deposition testimony of Dr. Borden who concluded that the Claimant's difficulties at work were caused by his underlying psychiatric problems rather than the difficulties at work causing the psychiatric problems. However, Dr. Borden was never able to completely sever the connection between the Claimant's psychiatric condition and his problems at work. Dr. Borden opined that the Claimant's family problems caused him to be more sensitive to criticisms at work. (RX 22 at 14) As a result, the criticisms at work caused him to slide deeper and deeper into depression. Dr. Borden's most reasonable conclusion that the Claimant's family problems were the root cause of his depression is not sufficient to rebut the Section 20(a) presumption as it does not completely rule out the connection between the various events at work and the Claimant's psychiatric condition.

If rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Volpe v. Northeast Marine Terminals,** 671 F. 2d 697 (2nd Cir. 1981); **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995); **Stevens v. Tacoma Boatbuilding Co**., 23 BRBS 191 (199); **Del Vecchio v. Bowers**, 296 U.S. 280 (1935). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F. 2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994).

Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted. This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti, supra**.

Based upon the foregoing, I find and conclude that Employer has failed in its attempt to introduce substantial evidence which rebuts the Section 20(a) presumption. Accordingly, Claimant has established a **prima facie** claim that Decedent's harm is a work-related injury, as shall be discussed below.

It is this Judge's conclusion that even if the Employer had presented substantial evidence to rebut the Section 20(a) presumption, the evidence, when weighed and evaluated as a whole, proves that the Claimant's psychiatric condition was aggravated by his work related stress and working conditions at the Employer's shipyard.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General**

Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

Employer contends that the Claimant has failed to establish an injury arising out of or in the course of Decedent's employment. According to Employer, any increase in stress was the result of legitimate personnel actions and, therefore, any disability resulting therefrom is not compensable. A review of the evidence and the current case law reveals that this is not the case.

Employer relies on the Board's holding in **Marino** which states that "an injury resulting from a legitimate personnel action, is not compensable under the Act. Such an event is not a working condition which can form the basis for a compensable injury. A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. **Marino v. Navy Exchange**, 20 BRBS 166, 168 (1988)

Claimant counters by arguing that Claimant had been dealing with his strictly personal problems quite well and that his condition did not deteriorate until the various incidents at work. Moreover, Claimant argues that the Employer's reading of **Marino** is overly expansive. Claimant argues that the holding in **Marino** is limited to a mental condition arising from a termination or layoff. It is also pointed out that in **Marino** the case was remanded to determine whether or not the cumulative nature of various other job stresses could have caused the claimant's mental condition.

It is not contested that the Claimant has, in fact, suffered a psychological injury and continues to suffer. Therefore, the first prong of establishing the *prima facie* case has been established. The disputed issue is whether or not conditions existed at work which could have caused the harm. In **Sewell v. Noncommissioned Officers' Open Mess**, 32 BRBS 134 (1997), the Board stated that the holding of **Marino** is not limited solely to termination proceedings but may apply to other personnel actions including, but not limited to, warnings such as was issued in the instant case.

However, in addition to the critique which resulted from the fire of January 1997 fire, the Claimant also alleges other working conditions which contributed to the harm. The Claimant is not required to show unusually stressful working conditions in establishing his prima facie case and even where the stress may seem relatively mild, the Claimant may recover if an injury results. **See Konno v. Young Brothers, Ltd.**, 28 BRBS 57 (1994). Rather, the proper inquiry as enunciated in **Sewell, supra**, is whether or not the various incidents which could have caused the harm did in fact occur. In this case, it is not disputed that there was a possibility of a layoff and that the Claimant was transferred to the third shift. Additionally, Claimant's allegation of friction between himself and his new supervisor was not rebutted at the hearing. Testimony was offered that there had not been any problems with Mr. Belastracci in the past and Mr. Belastracci testified that he did not have any problems with Mr. Putman. However, the relevant inquiry was whether or not Mr. Putman perceived friction between himself and Mr. Belastracci. On this point, I therefore credit the testimony of Mr. Putman. Moreover, while there is considerable dispute as to the propriety of the critique following the January 1997 fire, there is no dispute that the jobs assigned to Claimant following that incident involved a fire watcher and a greater danger of fire. Employer contends that Claimant was not singled out by this treatment because the ship was nearing completion and there were more flammable components in the ship. As a result of this, the normal procedure was followed to assign a fire watcher to the welders. While all of these facts may be true, it does not counter the fact that the cumulative effect of these actions caused a psychological injury to the Claimant. While another employee may have shrugged off these incidents, Mr. Putman did not and, as was mentioned earlier, the Employer takes its employees as it finds them and with all of his/her human frailties.

Therefore, I find and conclude, that the aggravation of the Decedent's underlying psychiatric problems constitute a work-related injury. This Administrative Law Judge, in so concluding, gives more weight to the opinions of Dr. Schroeder, who has seen Claimant since 1993, as opposed to Dr. Borden, who saw Claimant once upon referral from the Employer. In this regard, **see Pietrunti, supra**. Furthermore, this stipulated record conclusively establishes that Claimant gave the Employer timely notice of his work-related injury, that the Employer had timely notice thereof, that Claimant timely filed for benefits and that Employer timely controverted the entitlement to benefits.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic

concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

The nature and extent of Claimant’s disability is not contested in this case. Employer’s medical expert, Dr. Borden, does not speak to the Claimant’s residual work capacity in either his report or in his deposition testimony. Dr. Schroeder, the Claimant’s medical expert, wrote in one of his reports (CX 1) that the Claimant could not return to work at this time although he hopes that he will be able to return to work in the future. Dr. Schroeder reiterated this opinion in his deposition testimony when he agreed with Attorney Quay’s characterization of the Claimant as totally disabled. (CX 5 at 25) Therefore, I find and conclude that the Claimant has been totally disabled since February 11, 1997, the

date he was admitted to Backus Hospital for evaluation and treatment of his severe depression.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary

medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988). Accordingly, in view of the foregoing, Claimant is entitled to an award of medical benefits for the reasonable and necessary medical care and treatment for his psychological problems beginning on February 11, 1997, all of which benefits are subject to the provisions of Section 7 of the Act. Any unpaid medical expenses shall be submitted to the District Director as part of the orderly administration of this compensation award.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional

compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits by the Form LS-207. (RX 2) **Ramos v. Universal Dredgin Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee assessed against the Employer. Claimant's attorney filed a fee petition (CX 8) on November 18, 1998, concerning those services rendered and costs incurred in representing Claimant between May 12, 1997 and November 16, 1998. Attorney Embry seeks a fee of $6,742.54 including expenses for 29 hours of attorney time at $200.00, $195.71 and $165.00 per hour and five hours of paralegal time at $64.00, $60.00, $55.00 and $47.00 per hour. In accordance with established practice, this Administrative Law Judge will consider only those legal services rendered and costs incurred after May 7, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the Deputy Commissioner for her consideration.

The Employer objected (RX 25) to the hourly rates and proposed hourly rates of $185.00 for the attorneys and $55.00 for paralegals. This Administrative Law Judge agrees with Employer and finds the hourly rates excessive for Southeastern Connecticut at the present time. However, this Court intends to allow an inflationary increase for all services rendered in 1999. The amount is undetermined as of this time. Therefore, this Administrative Law Judge finds that an hourly rate of $185.00 per hour for the attorneys and $55.00 per hour for the paralegals is more than adequate in terms of the amount of time expended and the work performed on this specific case. Therefore, the Employer's objection is sustained and the application for attorney fees is reduced accordingly.

Employer also objected to the paralegal dates of service of February 18, 1998, March 11, 1998, March 20, 1998 and September 28, 1998 described only as "prepare paperwork" as lacking specificity. This Administrative Law Judge agrees and finds that the description is insufficient to adequately describe the nature and purpose of the task performed. Accordingly, one hour will be deducted from the time allotted to the paralegals. In this regard, future fee petitions shall be more specific as to the service rendered to enable this Court to determine their propriety.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the additional benefits obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $5,063.50, based on 29.5 hours of attorney time and four (4) hours of paralegal time, is fair,

reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. § 702.132, and is hereby approved. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on February 11, 1997, and continuing until further Order, the Employer as a self-insurer shall pay to the Claimant compensation benefits for his temporary total disability based upon an average weekly wage of $800.53, such compensation to be computed in accordance with Section 8(a) of the Act.

2. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961(1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act, and such benefits shall begin on February 11, 1997.

4. Employer shall pay to the Claimant's attorney, Stephen Embry, the sum of $5,063.50 as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between May 12, 1997 and November 16, 1998.

DAVID W. DINARDI
District Chief Judge

Dated:

Boston, Massachusetts
DWD:jd